

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION**

In the Matter of

BEVERLY ENTERPRISES d/b/a THE
HERMITAGE

Employer

and

SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 2020,
AFL-CIO

Petitioner

Case 1-RC-21704

DECISION AND DIRECTION OF ELECTION¹

This case concerns the supervisory status of licensed practical nurses (LPNs) who act as charge nurses. The Union seeks to represent a unit of about a dozen LPNs who work as charge nurses at The Hermitage, a nursing home in Worcester, Massachusetts.² The Hermitage maintains that the LPNs are all statutory supervisors by virtue of their authority to assign work, to responsibly direct employees, to discipline, and to complete

¹ Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

² The Hermitage is one of several nursing homes operated by Beverly Enterprises.

probationary and annual evaluations. The Union also seeks to include an LPN/weekend supervisor position, which The Hermitage maintains is also supervisory. I find that the LPN/charge nurses and LPN/weekend supervisor are nonsupervisory employees.³

Supervisory Status of the LPNs

FACTS

Background

The Hermitage is a long-term care facility with 101 beds. There are two units on the first floor, a 38-bed unit for Alzheimer's patients and a 32-bed unit referred to as the main station. A unit on the second floor has beds for 31 residents.

Robert Petroff is the executive director of The Hermitage. The nursing department is headed by Director of Nurses Gayle Sharigian. Three registered nurses (RNs) report directly to Sharigian: Assistant Director of Nurses Justine McDuffy, Staff Development Coordinator Ann Marie Acciavatti, and RN Assessment Coordinator and MMQ Nurse Laura Evans.⁴ There is a weekend supervisor position that is currently vacant. There are approximately five RNs and a dozen LPNs who act in the capacity of charge nurse on the three units, and about 50 certified nursing aides (CNAs).

On weekdays, the units at The Hermitage are staffed pursuant to the three traditional shifts for nursing homes, 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., and 11 p.m. to 7 a.m. On weekends, the RNs and LPNs work 12-hour shifts from 7 a.m. to 7 p.m. and 7 p.m. to 7 a.m., but the CNAs work the usual three eight-hour shifts.

During most shifts, each unit is staffed by one nurse, who acts as the charge nurse.⁵ During the day shift on weekdays, there may be either one or two nurses on each

³ The Hermitage currently employs no per diem LPNs. One per diem LPN, who was terminated, is the subject of a pending unfair labor practice charge in Case 1-CA-41432. At the hearing, the Union took the position that per diem LPNs should be included in the unit to the degree that they meet the Board's standard for regularity of employment. The Hermitage took the position that there are no per diem LPNs and that the terminated per diem LPN should not be included in the unit. Because of the uncertainty over this individual's status due to the pending unfair labor practice charge, I will permit her to vote under challenge.

⁴ Theresa Pietro was the director of nurses until she left on June 29, 2003, and Sharigian was hired as the new director of nurses on September 8, 2003. Neither Pietro nor Sharigian testified at the hearing. RN Assessment Coordinator Laura Evans, who did testify, has worked at The Hermitage for 16-17 years and served as acting director of nurses during the summer of 2003 until Sharigian arrived. Over the years, she has often performed the duties of an assistant director of nurses, although that was not her title, because there was no one in that position.

⁵ Both RNs and LPNs serve as charge nurses, and they generally perform the same duties, with a few exceptions. Only RNs may perform certain tasks, such as inserting gastrointestinal tubes, removing an intravenous line, or pronouncing the expiration of a resident.

unit. If there are two nurses, one is designated as the charge nurse, and the other is the secondary nurse.⁶ Finally, each unit is staffed by anywhere from two to five CNAs, depending on the unit and the shift.

Authority to assign work and responsibly direct the CNAs

Charge nurses are responsible for developing an initial and updated plan of care for each resident. They develop each plan with input from the resident's family, doctor, social worker, physical therapist, occupational therapist, speech therapist, and dietician. Three nurses on the day shift, one for each unit, have been designated "patient care coordinators." They participate in quarterly "MDS" meetings at which each resident's care plan is updated, although every nurse should be updating plans continuously.⁷

Charge nurses are responsible for meeting the medical needs of the residents on their unit. They assess the residents' medical condition, for example, by performing skin assessments, and they administer medications and treatments. If there are two nurses on a unit, they divide their responsibilities so that one acts as the charge nurse, running the unit overall, while the secondary nurse dispenses medications and treatments. They act as liaison to the residents' families and doctors.

The CNAs are responsible for assisting the residents with activities of daily living (ADLs), such as bathing, dressing, grooming, feeding, and toileting. They transport residents to activities. They reposition residents every two hours, using equipment such as bolsters and wedges to keep residents in the proper position. They weigh residents periodically according to a schedule, and take the residents' temperature. They use techniques prescribed in the plan of care, such as range of motion exercises or feeding techniques. They change linens, get residents up in the morning, put them to bed at night, and make sure bed alarms are on. They are responsible for documenting their work by completing ADL sheets for each resident.

Staff Development Coordinator Ann Marie Acciavatti currently schedules the nurses and CNAs for their shifts and units, setting up each weekly schedule about a week ahead of time. Most CNAs work on the same unit each week, although some float. CNAs need special training to work on the Alzheimer's unit, but there are no other restrictions in assigning them to units. Evans testified that LPNs may transfer CNAs from one unit to another without prior approval, if they are short-handed, but that this probably does not occur very often. If Evans or another manager is in the building, they would handle such transfers.

⁶ This division of responsibility is not permanent. That is, a nurse may act as the secondary nurse one day and a charge nurse on another day.

⁷ The patient care coordinators perform this role in addition to their regular duties as charge nurses. There is no pay differential for patient care coordinators. The record does not reveal whether they are RNs or LPNs.

To divide up the CNAs' workload, the patient care coordinators create "assignments." For example, the patient care coordinator may designate rooms one through ten as "Assignment A." When Acciavatti posts the weekly schedule, she also posts an assignment sheet, in which she has assigned each CNA on the shift to an assignment, i.e., assignment "A," "B," "C," etc.⁸ Evans testified that charge nurses may change the assignments. They may do so, for example, to accommodate a resident who prefers a female to a male CNA, or to match a CNA with more skill or longevity with an acutely ill resident. CNAs may ask their charge nurse to switch assignments if they are having difficulty with a particular resident. Finally, charge nurses may assign a CNA to work one-on-one with a resident for a period of time if the resident is acutely ill or has had multiple falls or has an intravenous line.

At the beginning of each shift, the charge nurses give "report" to the CNAs, telling them whether there has been any change in a resident's condition, whether a resident is going anywhere that day, or any other concerns. The assignment sheet drawn up by the day shift nurses shows what each particular patient needs for the day. Evans testified that the CNAs do routine tasks every day, but the charge nurse may add an extra task for a resident on a given day. She testified that the charge nurses make sure that the CNAs perform all of their duties and may send a CNA back to perform a task that they performed incorrectly. For example, they may tell CNAs that they failed to properly dress a resident for the weather, did not complete shaving a resident, or failed to use proper positioning equipment.⁹

Former Weekend Supervisor Karen Goodney testified that the CNAs pretty much know their responsibilities. The nurses may have to tell the CNAs to perform tasks that they have failed to perform, such as shaving a resident, but CNAs remind one another as well. Charge nurse Faith Hilton testified that the CNAs know what to do without being directed. Charge nurse Tara Brooks also testified that she does not need to give the CNAs any direction. She may ask them to let her know if a resident has voided. A CNA may tell her that a resident refuses to get washed up, in which case she tells the CNA to try later or switch residents with another CNA.

The assignments posted by Acciavatti also establish the CNAs' break times. CNAs are supposed to report to the charge nurse on the unit when they leave for a break

⁸ Former Weekend Supervisor Karen Goodney, who used to do the scheduling, testified that she tended to assign CNAs to the same unit each week, but to rotate them every week through assignments A, B, C, etc. Charge nurse Faith Hilton testified that on the Alzheimer's unit, where she works, the two CNAs on her shift do rounds together for all 38 residents, despite their separate assignments. They use the assignments only to divide up the work of completing the ADL sheets.

⁹ Staff Development Coordinator Acciavatti testified that she conducts orientation sessions for new nurses at which she tells the nurses that they are responsible for seeing that CNAs carry out procedures such as safety and infection control rules correctly and that they must reinforce this on the units.

and return. The charge nurses may change their break time, if necessary, to get the work done. Evans testified that charge nurses may “correct” a CNA who takes too long a break.

Evans testified that a charge nurse may approve a CNA’s request to leave early in case of illness or an emergency at home. Charge nurses do not need prior approval to do so, but may let a manager know after the fact, as a courtesy. This happens on off shifts when no manager is present. Charge nurse Tara Brooks testified that she did this only once. She told a CNA to leave early, because she was having chest pains and Brooks felt she should seek medical attention. Charge nurse Faith Hilton testified that she could let a CNA leave early if they request it and that she did this once when a CNA was ill. She notified ADON McDuffy, who happened to be filling in as a charge nurse that night, that she had sent the CNA home, and McDuffy sent over a CNA to replace her.

If a CNA calls a charge nurse to report that he or she will be absent for a scheduled shift, referred to as a call-out, the charge nurse will try to find a replacement by telephoning off-shift CNAs or per diems or by asking a CNA from the prior shift to stay over for an extra shift. Charge nurses do not have authority to require an off-shift CNA to come in to work or to require a CNA to work an extra shift. Brooks testified that she has been told she is not to cause overtime when finding replacements. Evans testified that sometimes “management” has directed the charge nurses not to replace a CNA who has called in sick.

Authority to evaluate

Probationary evaluations

New CNAs at The Hermitage receive a written evaluation after completing a three-month probationary period, referred to as an introductory evaluation. The evaluation form includes a place for the charge nurse who completes it to check off whether the CNA is recommended for retention, recommended for review again within 30 days, or not recommended for retention. New CNAs do not receive a raise at the end of the probationary period.

Evans testified that LPNs would bring any issues raised during the first three months of a CNA’s employment to the attention of the director of nurses, assistant director of nurses, or staff development coordinator, that they could recommend termination of a CNA who was not performing adequately during that period, and that management would follow that recommendation. However, she could not recall any instance in which an LPN recommended the termination of a probationary employee.¹⁰

¹⁰ The Hermitage did not introduce into evidence any introductory evaluations completed by LPNs. The Union introduced one introductory evaluation of a CNA that was completed by an RN in October 2002. In this evaluation, former DON Theresa Pietro, who signed the document after the nurse but two days before the CNA, crossed off the nurse’s rating of “NA” for seven job elements and inserted a rating.

Annual evaluations

Employees at The Hermitage, including CNAs, receive an annual written evaluation on the anniversary of their date of hire. Charge nurses, including LPNs, complete the evaluations for CNAs.¹¹ On the evaluation form, the nurses rate the CNAs on a scale from 1 to 4 with respect to numerous job elements.¹² They total the score and divide it by the number of job elements to come up with an overall rating between 1 and 4. There is also space for comments.

Evans testified that the director of nurses could, but does not typically, have input into CNA evaluations prior to completion. LPNs may approach the director of nurses or another manager to discuss evaluations, but they are not required to do so before reviewing them with the CNAs. On August 21, 2003, while she was acting director of nurses, Evans sent an e-mail to former Weekend Supervisor Karen Goodney and Assistant Director of Nurses McDuffy, in which she gave them a list of evaluations that needed to be completed and told them to give them to the executive director, Robert Petroff, for his review before they sat down with the employees to review them. Evans testified that she could not recall why Petroff wanted to review the evaluations at that point and that it is not their usual practice.

Karen Goodney testified that, when she was the weekend supervisor, the director of nurses gave her a packet of evaluations to be completed for CNAs, which she would distribute to the nurses. The nurses would turn the evaluations in to the director of nurses after they had completed them, and sometimes, but not always, the director of nurses would return them to the nurses to review with the CNAs. Goodney testified that it was pretty common for the director of nurses to make changes to evaluations and, at times, the DON made changes to the scores.¹³

LPN Faith Hilton has completed only one evaluation of a CNA, Denise Allen, which was in February 2003. Hilton testified that ADON Justine McDuffy told her to return the evaluation to McDuffy after she completed it, which she did. McDuffy then told her that The Hermitage usually does not give all “1’s” on an evaluation. Hilton never met with Allen to review the evaluation. Director of Nurses Pietro signed it before

¹¹ It appears that charge nurses may not complete all of the CNA evaluations. A January 2003 annual evaluation of CNA Delores Asamoah was signed only by the director of nurses.

¹² A rating of “1” denotes “Exceeded all performance expectations,” “2” denotes “Met and exceeded most performance expectations,” “3” denotes “Met performance expectations,” and “4” denotes “Did not meet performance expectations.”

¹³ Although The Hermitage employs approximately 50 CNAs, only four annual evaluations of CNAs completed by LPNs were submitted into evidence. It appears that in one case, the DON changed seven ratings from “NA” or “1” to “2,” and in another case the DON changed two ratings of “NA” to “1.” A third evaluation has one altered rating. The LPN’s ratings in the fourth annual evaluation were unchanged.

the CNA did, and it appears from the evaluation that two ratings of “NA” were changed to a “1.”

LPN Tara Brooks has completed only one evaluation of a CNA, and that was quite a while ago. She returned it to Pietro after completing it. She never met with the CNA and never saw it again. She does not know if anyone made changes to her ratings.

Evans testified that the annual evaluations are used to determine merit increases and that the director of nurses determines whether a CNA will receive a wage increase. The potential raise depends on what the corporation allows in a given year and varies from year to year. Jay Bagley, Beverly Enterprise’s managing director of human resources and labor relations for the region that includes Massachusetts, testified that, in 2002, all wage increases were delayed by three months. In 2003, there was a wage freeze for all Beverly Enterprise employees in Massachusetts. The wage freeze is still in effect, but it will not be permanent.

The Hermitage does not maintain any guidelines that establish a particular correlation between employees’ overall ratings on their evaluation and the amount of their raises. Evans testified that a CNA with a poor evaluation may get no raise or a minimum percentage raise, while a CNA with a better evaluation may receive the maximum percentage allowed or somewhere in-between.¹⁴ Although there is no space on the evaluation form for a recommendation, Evans testified that some nurses write in a recommendation for a raise on the evaluation.¹⁵ There is no evidence in the record regarding actual raises received by CNAs as a result of their evaluations. Evans testified that she knows of no CNAs that did not get a raise because of their evaluations, although she has not reviewed many evaluations. Goodney testified that she was never told how the ratings would affect the CNAs’ raises or that a CNA could receive a “partial” raise based on an evaluation, and she did not know the amount of raises CNAs received. Evans testified evaluations could affect promotional opportunities and that an extremely poor evaluation could lead to discipline, but she gave no examples where this has occurred.

Authority to discipline

Beverly Enterprises maintains a disciplinary policy that describes the consequences of various types of offenses. The most serious types of offenses, called Category 1, result in immediate suspension without pay, pending investigation for

¹⁴ As noted above, neither the former director of nurses nor the current director of nurses testified at the hearing, and there was no record evidence about the specific methodology either of them used in the past or will use in the future to determine the amount of wage increases.

¹⁵ In a 2001 evaluation submitted into evidence, an LPN wrote in the comment section that she recommended the CNA for the maximum raise. The record does not reveal whether the CNA received the maximum raise. Of the three other evaluations of CNAs by LPNs that were submitted into evidence, none included a specific recommendation for a raise.

discharge. Other types of misconduct, called Category 2, result in progressive discipline consisting of written warnings for the first, second, and third infractions, and suspension pending investigation for discharge for the fourth infraction. The policy provides, however, that the procedures are not absolute rules, and that appropriate discipline or counseling action will be determined at Beverly's discretion on the basis of the particular circumstances.

Evans testified that LPNs are authorized to discipline CNAs under this policy, without prior approval, including the authority to give a verbal warning or issue a written warning to CNAs. The Hermitage submitted into evidence only one written warning, a first written warning that LPN Joyce Nadeau issued to a CNA in July 2002 for leaving the work area for an extended period of time without notifying the charge nurse. The warning was co-signed by then Director of Nurses Theresa Pietro the day after Nadeau and the CNA signed it.¹⁶ Evans testified that written discipline is not frequent at The Hermitage. She could not recall any other warnings issued by LPNs in recent years. Discipline over attendance problems, which is the main issue for CNAs, is not handled by the LPNs. Charge nurses do not have access to the CNAs' personnel files unless they ask the director of nurses.

Evans and Acciavatti testified that charge nurses have authority to suspend CNAs, without prior approval, for serious violations such as impairment by drugs or alcohol, sleeping while on duty, insubordination, or suspected neglect or abuse of a resident. Acciavatti tells new nurses about their authority to suspend CNAs during orientation. The director of nurses would review the matter after that. Evans also testified that LPNs have authority to make a recommendation concerning termination. Neither Evans nor Acciavatti could recall any suspensions or terminations in recent years.

Acciavatti testified that, within the last two years, there was an incident on the 3 to 11 shift in which a resident accused a CNA of slapping her. The nurse spoke to both the resident and the CNA and decided that the resident was confused and had not been slapped. She did not send the CNA home, but left a message for the director of nurses to follow up the next day.

Charge nurse Tara Brooks, who has worked at The Hermitage for three years and nine months and works nights, testified that she has never issued written discipline. She once found a CNA harassing a resident. She told the CNA to leave the resident alone and sent an e-mail about it to the weekend supervisor, staff development coordinator, and director of nurses. They never instructed her to discipline the CNA. In another incident, Brooks told former Weekend Supervisor Goodney about a CNA who left work early. Goodney asked her to "write him up," but Brooks said that she would not, that it was not her business. Goodney issued a warning to the CNA, and did not discipline Brooks for

¹⁶ Evans, through whom the warning was offered, had no personal knowledge of the circumstances surrounding the issuance of this warning, such as whether Nadeau consulted with any managers prior to issuing it.

failing to do so. Brooks testified that if a CNA were intoxicated she would call a supervisor, but this has never happened.

LPN Faith Hilton has worked at The Hermitage since September 2002 and works the night shift. She testified that she has never issued written discipline to CNAs. She has handled minor disciplinary problems, such as arriving late or leaving for breaks without telling her, by simply speaking to the CNA about it. On one occasion, someone had assigned a CNA to work “one-on-one” with a resident. Hilton told Assistant Director of Nurses McDuffy, who happened to be working as a charge nurse that night, that this was not a good idea because the CNA had a tendency to fall asleep. McDuffy told Hilton to send the CNA to her if there were a problem. Hilton had to wake the CNA several times and finally sent him to McDuffy. Hilton did not discipline the CNA, nor did McDuffy instruct her to. Hilton testified that she believes she could have disciplined him, although she is not familiar with the discipline policy.

Secondary indicia

The LPNs who work on the evening and night shifts are the highest level of authority at the facility during those hours. The LPNs are primarily responsible for dealing with issues that arise during those shifts, such as staffing problems, the death of residents, family situations, building maintenance problems, and fire drills. Goodney testified that the new director of nurses told her to call her if a patient fell or was sent to the hospital during her shift. LPNs would be responsible, in the case of a disaster, to follow the protocol for leaving residents in their rooms or evacuating them if necessary and calling the authorities. Brooks testified that one day within the last year, the fire alarms kept going off. She followed the procedure to call a certain number, ensured that the residents were in their rooms, kept their doors closed, and did a head count. The CNAs did the same things, and she did not need to direct them.

The job description for charge nurses states that they supervise the CNAs in the delivery of nursing care, coach, counsel, and assign CNAs to provide resident care. They are to evaluate the job skills and work performance of CNAs through a formal evaluation process and discipline CNAs for violations of work rules or policies or for poor performance, including recommending suspensions and terminations. The job description states that the charge nurses assign CNAs specific duties for resident care and direct their work, and assign hours, breaks, and meal periods to CNAs. It states that they call in replacements and transfer CNAs to ensure adequate staffing levels and revise their work schedules as necessary. They are to train new CNAs, attempt to resolve their complaints and grievances, and participate in supervisory meetings. The LPNs are rated in their annual evaluations on job elements such as evaluating, disciplining, and training CNAs, calling in replacements, and reassigning CNAs to ensure adequate staffing levels.

ANALYSIS

Pursuant to Section 2(11) of the Act, the term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. Chicago Metallic Corp.¹⁷ The status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification. New Fern Restorium Co.¹⁸ The burden of proving supervisory status rests on the party alleging that such status exists. NLRB v. Kentucky River Community Care¹⁹ The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. Quadrex Environmental Co.²⁰

Authority to responsibly direct the CNAs

For many years, the Board held that individuals such as charge nurses will not be deemed to have used “independent judgment” when they exercise ordinary professional or technical judgment in directing less skilled employees to deliver services in accordance with employer-specified standards. In NLRB v. Kentucky River,²¹ the Supreme Court rejected that interpretation of the term “independent judgment” as inconsistent with the Act, although it recognized that it is within the Board’s discretion to determine, within reason, what scope or degree of “independent judgment” meets the statutory threshold.

I conclude that, in this case, the degree of judgment exercised by the LPNs in directing the CNAs is insufficient to support a finding of supervisory status. The tasks that CNAs perform, such as feeding, dressing, and grooming residents, are very repetitive and require little skill. Three LPNs testified that the CNAs pretty much know their responsibilities and do not need any direction. Bozeman Deaconess Hospital.²² (the record shows that the LPNs and aides are familiar with the tasks they are assigned to

¹⁷ 273 NLRB 1677, 1689 (1985).

¹⁸ 175 NLRB 871 (1969).

¹⁹ 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

²⁰ 308 NLRB 101, 102 (1992).

²¹ 121 S. Ct. 1861 (2001).

²² 322 NLRB 1107 (1997).

perform and require little further instruction in carrying out their duties). Under these circumstances, the Board has found in post-Kentucky River cases that charge nurses' authority to make sure that CNAs perform their jobs properly and to call to their attention that a task has not been performed properly does not require independent judgment. Beverly Health and Rehabilitation Services, Inc.²³ (LPNs who relate particular resident care requirements to CNAs and show CNAs the correct way to perform a task if they observe them doing something incorrectly are not supervisors; duties require little skill, are repetitive and at times even unpleasant); Meridian Home Care Services²⁴ (preparing a care plan and directing home health aides to carry out a "check list" of routine duties does not usually require Section 2(11) judgment); Franklin Hospital Medical Center.²⁵

Authority to assign work

The LPNs' role in assigning work does not demonstrate supervisory status. It is the staff development coordinator who schedules the CNAs to work a particular shift and unit. The charge nurses' authority to transfer CNAs between units in the event that a unit is short-staffed does not confer supervisory status, in the absence of evidence that such transfers involve anything more than a routine judgment as to the number of CNAs needed to serve a particular number of patients. Northern Montana Health Care Center.²⁶ I also note that Evans gave no examples of such transfers and testified that they probably do not occur very often and only during shifts when higher managers are not present.

It requires no independent judgment for the LPN/patient care coordinators to devise the list of residents that constitute an assignment, where, for example, they designate rooms one through ten as "Assignment A." The staff development coordinator, not the charge nurses, then assigns the CNAs to their assignments for each shift. While the charge nurses may sometimes change an assignment to a particular resident based on the type of assistance needed or the gender or skills of the CNA, the Board has found that work assignments based on assessments of employees' skills, when the differences in skills are well known, are routine functions that do not require the exercise of independent judgment.

Authority to approve breaks has been found to be routine clerical judgment not requiring the exercise of independent judgment. Loyalhanna Care Center;²⁷ Youville

²³ 335 NLRB 635 (2001).

²⁴ Case 22-RC-12098 (2002) (review denied in an unpublished decision).

²⁵ 337 NLRB No. 132 (July 17, 2002).

²⁶ 324 NLRB 752, 754 (1997), enforcement granted in relevant part, Northern Montana Health Care Center v. NLRB, 178 F.3d 1089 (9th Cir. 1999).

²⁷ 332 NLRB 933, 935 (2000).

Health Care Center, Inc.²⁸ Similarly, the Board has found that there does not appear to be any substantial degree of judgment involved in permitting an employee who is too ill to work or one who experiences a family emergency, to go home. Loyalhanna Care Center,²⁹ Washington Nursing Home.³⁰ Finally, the LPNs' authority to find replacements for CNAs who "call out" by offering the work to off-shift CNAs does not confer supervisory status, where the LPNs are only asking for volunteers and cannot compel CNAs either to come in to work or to stay past the end of their scheduled shift. Harborside Health Care.³¹

Authority to evaluate

Probationary evaluations

I decline to find that the LPNs are statutory supervisors by virtue of their role in completing evaluations of probationary employees. I note, at the outset, that The Hermitage has not introduced into evidence any probationary evaluations completed by LPNs. Assuming that LPNs do complete such evaluations of newly-hired CNAs, there is no evidence that any LPN's evaluation of a probationary CNA has ever led to their termination or to the extension of their probationary period, and Evans testified that she could not recall any instance in which an LPN recommended the termination of a probationary employee. When an evaluation does not, by itself, affect the wages and/or job status of an employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. Harborside Healthcare, Inc.³²

Annual evaluations

The LPNs' role in completing the CNAs' annual appraisals does not confer Section 2(11) status.³³ The Hermitage asserts that by completing the CNAs' evaluations, the LPNs effectively recommend their merit increases. The Hermitage has failed to demonstrate, however, that there is a direct correlation between the ratings given by the

²⁸ 326 NLRB 495, 496 (1998).

²⁹ Supra at 935.

³⁰ 321 NLRB 366, 367 fn. 4 (1996).

³¹ 330 NLRB 1334, 1336 (2000).

³² Id. at 1334.

³³ I note that the evidence is in conflict as to whether the prior or new director of nurses typically reviewed or will review the evaluations completed by the LPNs before their presentation to the CNAs. Further, the record is insufficient to determine the frequency with which the director of nurses altered or will alter the ratings given by the LPNs, since it includes only four annual evaluations of CNAs that were completed by LPNs, although there are 50 CNAs employed at The Hermitage.

LPNs and the amount of the CNAs' merit raises.³⁴ The Hermitage does not maintain any guidelines that establish such a correlation, and there was no evidence as to precisely what methodology the former DON used or the current DON will use to determine the amount of a CNA's raise. Evans' testimony that a CNA with a poor evaluation may get no raise or a minimum percentage raise, while a CNA with a better evaluation may receive the maximum percentage allowed or somewhere in-between is too vague to demonstrate that the ratings given by the LPNs directly affect wage increases, particularly where The Hermitage introduced no evidence regarding any raises actually received by CNAs as a result of their appraisals.³⁵ Harborside Healthcare, Inc.³⁶ (evidence fails to establish a direct link between evaluations and pay increases where DON merely takes the evaluations "into consideration" in determining raises); Elmhurst Extended Care Facilities³⁷ (no practice of directly correlating evaluation scores to specific merit increases, and the employer's witness did not know what "system" would be used to assign increases that year); Cf. Bayou Manor Health Center, Inc.³⁸ (specific percentage wage increases corresponded to the scores on evaluation forms completed by LPNs).

Authority to discipline

The Hermitage asserts that LPNs are statutory supervisors by virtue of their authority to issue verbal discipline, to issue written discipline that may lead directly to suspension and/or termination, and to suspend CNAs in certain circumstances. I disagree.

The power to verbally reprimand employees is too minor a disciplinary function to amount to statutory authority to discipline. Passavant Health Center.³⁹ Notwithstanding Evans' general testimony that LPNs have authority to issue written warnings to CNAs without prior approval, The Hermitage produced only one written warning issued by an LPN to a CNA, and there is no evidence regarding the

³⁴ The fact that, in one evaluation in 2001, an LPN wrote that she recommended the CNA for the maximum raise does not establish supervisory status, where one evaluation is insufficient to establish a practice of LPNs recommending particular raises, and there is no evidence that the LPN's recommendation was effective in that it was followed.

³⁵ Obviously, in 2003, the performance appraisals had no effect on merit increases at all because of the wage freeze. I do not rely on the wage freeze, however, in reaching my conclusion that the ratings do not affect wage increases, because of Bagley's testimony that the wage freeze will not be permanent.

³⁶ 330 NLRB 1334, 1335 (2000).

³⁷ 329 NLRB 535, 537 (1999).

³⁸ 311 NLRB 955 (1993).

³⁹ 284 NLRB 887, 889 (1987).

circumstances surrounding its issuance, such as whether the LPN consulted with any higher authority before issuing it. From testimony about four other instances of misconduct by CNAs, it appears that in each case the LPNs referred the matter to the DON, ADON, or weekend supervisor without issuing a warning themselves or even recommending a warning. In fact, in one of those incidents, the weekend supervisor told the LPN to “write up” the CNA, but the LPN refused, stating that it was not her business. In these circumstances, the one unexplained instance in which an LPN actually issued a written warning is too isolated an event to confer supervisory status. Ten Broeck Commons⁴⁰ (failure to exercise supervisory authority is probative of whether such authority exists).

Further, the Board has found that written warnings are not themselves a form of discipline. Illinois Veterans Home at Anna L.P.⁴¹ Authority to issue warnings that do not automatically affect job status or tenure does not constitute supervisory authority. Ohio Masonic Home.⁴² Here, The Hermitage’s disciplinary policy provides that a fourth violation of its rules after receipt of three written warnings may result in suspension pending investigation for discharge, but the policy also provides that The Hermitage also retains discretion to determine appropriate discipline based on the circumstances. Thus, written warnings issued by the LPNs do not automatically lead to personnel action. Green Acres Country Care Center⁴³

As for the LPNs’ alleged power to suspend CNAs, without prior approval, for serious violations such as alcohol impairment, sleeping while on duty, or abuse of a resident, there is no evidence that an LPN has ever done so. In fact, when confronted with a CNA who was sleeping on duty, LPN Faith Hilton did not suspend him, but sent him to the ADON, as instructed. In any event, the Board has held that the authority to send employees home for such flagrant violations is not an indicium of supervisory authority, because the offenses are such obvious violations of the employer’s policies that no independent judgment is involved in the decision. Michigan Masonic Home.⁴⁴

Secondary indicia

The job descriptions and evaluations of the LPNs, read in the abstract, appear to endow them with Section 2(11) authority over the CNAs. The reality, as demonstrated by the record, however, is that they do not possess the authority described in those

⁴⁰ 320 NLRB 806 (1996).

⁴¹ 323 NLRB 890 (1997).

⁴² 295 NLRB 390, 394 (1989).

⁴³ 327 NLRB 257 (1998).

⁴⁴ 332 NLRB 1409, 1411 fn. 5 (2000).

documents. The issuance of “paper authority” that is not exercised does not establish supervisory status. Crittenton Hospital;⁴⁵ Beverly Health and Rehabilitative Services;⁴⁶

The fact that the charge nurses are, at times, the highest ranking individuals at the facility does not warrant a different result. The Board has held that secondary indicia such as this are insufficient by themselves to establish supervisory status, unless there is evidence that the disputed individuals possess one or more of the statutory powers. Ken-Crest Services.⁴⁷

Supervisory Status of the Weekend Supervisor

FACTS

LPN Karen Goodney, who started working at The Hermitage in 1993, was the weekend supervisor from 1996 until her suspension on November 21, 2003.⁴⁸ The position is currently vacant. At the time of her suspension, she worked from 7 a.m. to 7 p.m. on Saturdays and Sundays, as well as 5 p.m. to 11 p.m. on Wednesday evenings.

As weekend supervisor, Goodney was the highest-ranking nurse at The Hermitage on weekends, and Evans testified that Goodney had overall responsibility for the facility. She “supervised” the nurses, ensured adequate staffing, assisted with nursing care when necessary, and dealt with any family issues or building maintenance issues that arose on the weekend. She investigated incidents, such as falls, set up lab services, and audited charts. Goodney completed evaluations of the LPNs and delegated evaluations of CNAs to the LPNs. She met with the previous director of nurses about once a week to fill her in on things going on at the facility. She received a pay differential as weekend supervisor.

As weekend supervisor, Goodney was responsible for scheduling all of the nurses and CNAs at the facility, including their assignment to residents. Goodney testified that, in doing so, she was required to remain within the department’s budget for nursing staff and to complete forms for Medicare. Goodney prepared the schedule in two-week intervals. For the most part, she assigned employees to work the same schedule every week. Nurses and CNAs submitted requests for days off to her. She had to deny such requests a few times, because she was unable to find a replacement without paying overtime pay.⁴⁹ If she still needed slots filled after posting the schedule, Goodney would

⁴⁵ 328 NLRB 879 (1999).

⁴⁶ Supra, ALJD at 669-670.

⁴⁷ 335 NLRB 777, 779 (2001).

⁴⁸ Goodney was ultimately terminated on December 4, 2003. Her termination is the subject of a pending unfair labor practice charge in Case 1-CA-41400.

⁴⁹ If Goodney denied an employee’s request for time off, the employee could try to find his or her own replacement, so long as no overtime pay was required.

post a list of available shifts so that staff could volunteer to fill them. Goodney found replacements for “call-outs” that occurred on the weekend.

In addition, Goodney was responsible for ordering stock medications. This involved reviewing a list of residents on stock medications and giving a list of needed medications to an employee in the central supply department. She performed summary audits of medication sheets, which involved informing nurses of any missing information. Nurses had seven days to complete the information or they could be “written up.” She performed “AIMS” testing on patients who were taking psychoactive medications.

One day in August, 2003, Evans, who was acting director of nurses at the time, informed Goodney that Petroff had asked Evans to take over the scheduling and assignments. Evans said that it would be easier for her to handle it, because Goodney was not present during the week to handle call-outs. (The task of scheduling nurses and CNAs was soon after transferred to Staff Development Coordinator Acciavatti, who currently handles it.) Evans told Goodney that she would no longer order stock medications, that RN Deborah Gordon would do the summary audits, and that the patient care coordinators would perform the AIMS testing. Evans told Goodney that she wished to free her up to work on the floor more. Neither Goodney’s title nor her pay differential were taken away as a result of her change in duties.⁵⁰

Goodney testified that 90 percent of her thirty-hour workweek had been devoted to the duties that were taken away from her. The following week, she telephoned Evans to ask if she was being fired or her job eliminated, but Evans said no, that she was only freeing her up to do other things. Goodney testified that she e-mailed Evans to ask what she should do on weekends, since she had been relieved of all her other duties. Evans replied that she should help feed patients, do treatments, and help where needed, that she was just another nurse in the building.⁵¹

Goodney testified that, after her change in duties, she performed no duties that a charge nurse would not perform. She did treatments, wrote nursing summaries, administered medications, helped feed residents, helped CNAs with their work, gave tours of the nursing home, and did a report for a new lab company. On two occasions, Acciavatti listed her on the schedule as the secondary nurse on a unit, whereas Goodney always used to list herself as the “supervisor” on weekends.

On August 11, 2003, after she had notified Goodney of the change in her duties, Evans sent Goodney an e-mail in which she stated, “If you are not on a floor you will be supervising the house as we spoke of before and doing treatments.” In an August 21,

⁵⁰ Goodney testified that she was never told she was no longer allowed to discipline employees, but the record does not reveal what her role in discipline was, other than the fact that she issued one warning to a CNA, described above.

⁵¹ Goodney testified that she does not have that e-mail from Evans, because she lost access to her e-mail after her suspension in November.

2003 e-mail, Evans told Goodney, “[y]our role has had no significant changes except for the schedule.” In an e-mail to Goodney on August 28, 2003, Evans wrote, “I am meeting with CNA’s and nurses today about punching out and taking only appropriate lunch breaks and not leaving the floor without asking the nurse. I have had some problems during the week. please keep an eye on the weekend...I am told that some CNA’s are not doing rounds. Please check on w/e also.” Goodney testified that checking that CNAs do rounds is something that LPNs do routinely.

On August 21, 2003, Evans sent to Goodney and ADON McDuffy a list of nurses and/or CNAs whose evaluations were due the following month, asking them to give the appraisals to Petroff for his review when they were done, before meeting with the employees. Goodney delegated some of them and completed one evaluation of an LPN, herself.

On one occasion after the change in her duties, a CNA asked Goodney to adjust an assignment, but she did not feel she could. In an e-mail dated September 1, 2003, Evans wrote to Goodney, “I understand that you were reluctant to change assignments. It is fine to change assignments if you feel it is needed.” Goodney testified that changing assignments is something any LPN may do if he or she feels it is needed.

In an e-mail to the new director of nurses, Gayle Sharigian, on October 1, 2003, Goodney asked if it was okay to replace one call-out on the weekends, although the general practice was generally not to find a replacement for just one absent CNA.

Goodney testified that, in mid-October, she told Sharigian that she was unclear what her job duties were. She told Sharigian that Evans had said she was to help feed residents, do treatments, and help out wherever needed. Sharigian confirmed that those were her job duties and that, essentially, she would be the extra nurse in case of a call-out.

At the end of October, Sharigian announced that if a fall occurred on a weekend that required a trip to the hospital, the nurses were to report the incident to Sharigian. Previously, the nurses had been required to report such incidents to Goodney.

By e-mail dated October 24, 2003, Evans asked Goodney to speak to the nurses on the weekend shifts regarding any missing documentation needed for a “mock” survey to be done in anticipation of a survey of the facility by a state agency. Goodney checked the documentation and told the nurses to fill in missing information. She testified that RN Deb Gordon performed that function as well, and that LPNs are responsible for checking their own documentation.

ANALYSIS

The Union takes the position that Goodney became a statutory supervisor when she took the position of weekend supervisor in 1996, but it asserts that The Hermitage stripped her of all her supervisory duties in August 2003, after which she reverted to

being a non-supervisory LPN. The Hermitage contends that the changes in Goodney's duties did not alter the supervisory nature of the weekend supervisor position,⁵² in that Goodney could still discipline employees, evaluate LPNs, and change assignments, and she retained her title and pay differential throughout her employment.⁵³

I find that Goodney was a statutory supervisor until August 2003, by virtue of her authority to schedule employees for work and approve their time off. When The Hermitage took that duty away from Goodney in August 2003, it transformed the weekend supervisor position into that of a nonsupervisory employee.⁵⁴ While Goodney continued to evaluate employees after the change in her duties, I have found, above, that The Hermitage has failed to demonstrate that its performance appraisals have a direct effect on wage increases or job status. Goodney's authority to change the CNAs' assignments is no different from that of the LPN charge nurses, whom I have already found to be nonsupervisory employees. The only evidence regarding her role in discipline was Goodney's testimony that, after the change in her duties, she was never told she could no longer discipline employees and a charge nurse's testimony that Goodney once issued a written warning to a CNA. In the absence of specific evidence about her authority to discipline, I conclude that The Hermitage has failed to demonstrate that her authority in this area was any greater than that of the LPN charge nurses, whom I have found, for the reasons above, do not possess statutory authority to discipline. Finally, Goodney's retention of the title of weekend supervisor and a pay differential after the change in her duties are merely secondary indicia that are insufficient, by themselves, to accord supervisory status. Therefore, I find that the position of weekend supervisor is that of a nonsupervisory employee, and I will include it in the unit.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time licensed practical nurses, including the weekend supervisor, employed by the Employer at its Worcester, Massachusetts facility, but excluding registered nurses, managers, guards and supervisors as defined in the Act.

⁵² The Hermitage asserts that the duties that were taken away from Goodney were largely "clerical."

⁵³ The Hermitage also asserts that, even if Goodney reverted to an LPN position after the change in her duties, all of the LPNs are statutory supervisors. As explained above, I have found otherwise.

⁵⁴ In concluding that the change in the duties of the weekend supervisor transformed that position into a nonsupervisory position, I do not rely on the fact that the weekend supervisor was no longer to order stock medications or to do AIMS testing or summary audits, which were never supervisory tasks to begin with.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by Service Employees International Union, Local 2020, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc.;⁵⁵ NLRB v. Wyman-Gordon Co.⁵⁶ Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. North Macon Health Care Facility.⁵⁷ In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before January 28, 2004. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

⁵⁵ 156 NLRB 1236 (1966).

⁵⁶ 394 U.S. 759 (1969).

⁵⁷ 315 NLRB 359 (1994).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by February 4, 2004.

/s/ Rosemary Pye
Rosemary Pye, Regional Director
First Region
National Labor Relations Board
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, MA 02222-1072

Dated at Boston, Massachusetts
this 21st day of January, 2004.

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460-7550-8700

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